BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of New Rules I through IV and the amendment of ARM 37.82.101 pertaining to Medicaid eligibility	))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Interested Persons

1. On May 8, 2008, the Department of Public Health and Human Services published MAR Notice No. 37-442 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules, at page 915 of the 2008 Montana Administrative Register, issue number 9.

2. The department has adopted New Rule I (ARM 37.82.710), Rule II (ARM 37.82.910), Rule III (ARM 37.82.1116), and Rule IV (ARM 37.82.1320) as proposed.

3. The department has amended ARM 37.82.101 as proposed.

4. The department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: The proposed policy that no exclusions will be applied to property an assistance unit does not own, including property that is owned by any kind of trust, corporation, partnership, limited liability company, or other legal entity, is unconstitutional. The Montana Supreme Court indicated in Timm v. Montana Department of Public Health and Human Services that the department's rules regarding exclusions violate the right to equal protection. The Supreme Court's rulings in Timm and in Hofer et al. v. Montana Department of Public Health and Human Services were very clear in terms of what the department can or cannot do in terms of making distinctions between different people in regard to granting or denying them Medicaid benefits.

The department's proposed rules changes, including the proposed adoption of Rules I, II, III, and IV, and the amendment of ARM 37.82.101 to incorporate revised sections of the Medicaid manuals setting forth the proposed policy regarding exclusions, are nothing more than a calculated attempt by the department to circumvent prior administrative and judicial decisions, such as decisions in the Timm and Hofer cases. To go forward with the proposed rule changes in light of the clear directives from the Supreme Court in relation to what the department can and cannot do in rule changes would be an act of bad faith on the department's part.

RESPONSE: As the department stated on the Notice of Public Hearing on Proposed Adoption and Amendment, the impetus for adopting Rules I, II, III, and IV and making changes in the Medicaid manuals was litigation in which the department was recently involved, namely Timm v. DPHHS, 2008 MT 126, 343 Mont. 11, 2008 Mont. LEXIS 185. The purpose of the proposed changes was not to circumvent the Supreme Court's ruling in that case, however, but to correct ambiguities in Medicaid policy which the Court's decision called to the department's attention.

In Timm the Montana Supreme Court addressed the constitutionality of the department's "no corporations, no trust" policy. This policy provides that certain property owned by a Medicaid applicant or the applicant's spouse, such as property necessary for employment, is excluded in determining Medicaid eligibility, but further provides that the same property will be counted instead of excluded if the property is owned by a trust or corporation rather than by the applicant or spouse. Mr. Timm asserted that the "no corporations, no trust" policy violates his right to equal protection.

The department argued that there is a rational basis for denying an exclusion for property necessary for employment if it is owned by a corporation or trust but excluding the same property if it is personally owned, because the purpose of permitting an exclusion for property necessary for employment is to ensure that an applicant or applicant's spouse is not forced to sell property needed for employment in order to reduce their resources to a level needed to become eligible for Medicaid. Because applicants who have an interest in a corporation or trust do not legally own the property in question, the harm sought to be minimized by excluding property necessary for employment, namely that the applicant would be forced to sell the property in order to be eligible for Medicaid, does not exist when the property is owned by a corporation, trust, or other legal entity.

The court rejected the department's contention that there is a rational basis for not allowing owners of corporate or trust property to exclude property necessary for employment and thus held that the department's "no corporations, no trust" policy, as the court understood it, violates the guarantee of equal protection. In reaching this conclusion the court relied on a provision in Section MA 402-1 of the department's Aged Blind and Disabled Medicaid Manual which the court interpreted as allowing an exclusion for property necessary for employment if the property was owned by a limited liability company (LLC). The court said that there was no rational basis for not allowing a resource exclusion for property held in trust or owned by a corporation when, as the court interpreted Section MA 402-1, an exclusion was allowed for property owned by an LLC. The court therefore found the "no corporation, no trust" policy to be a violation of equal protection.

The department never intended to provide an exclusion for property owned by an LLC and does not believe that MA 402-1 allows a resource exclusion for property necessary for employment if it is owned by an LLC. To the extent that MA 402-1 may be susceptible of such an interpretation, however, the department has undertaken this rulemaking to clarify the department's policy that resource exclusions may not be applied to property an applicant or spouse does not personally own, as well as to cure the equal protection problem identified by the court in Timm.

The department is not, as the commentor asserts, adopting a policy that the Supreme Court found to be unconstitutional. On the contrary, by clarifying that no resource exclusions apply to property that is not personally owned by an applicant or spouse, including property owned by an LLC, the department seeks to cure the alleged defect which the court in Timm found rendered the "no corporation, no trust" policy unconstitutional. The court specifically stated in Timm that "the state may adopt rules aimed at allowing exclusions for some property, and denying such exclusions for others. *Hofer*, ¶ 31 (noting that Congress has passed legislation specifically aimed at 'restrict[ing] the ability of applicants to use trusts to shelter assets and gain Medicaid eligibility.')" Timm at ¶ 40. The court stated that cost containment is a valid basis for adopting rules that deny exclusions to some classes of Medicaid applicants while allowing the exclusions to other classes of applicants provided there is a rational basis for the classification; the court observed that "[b]ecause the funds available under Medicaid are limited, the administration of Medicaid is at its essence based on controlling costs." Timm at ¶ 40.

There is a rational basis for limiting exclusions, including the exclusion for property necessary for employment, to property an applicant or spouse personally owns and denying exclusions for property they do not personally own but that is owned by or held in another legal entity, such as a corporation, trust, or LLC. The rationale for the employment exclusion is to ensure that applicants who own property necessary for employment, such as plumbers who own plumbing tools, are not put in the position of having to sell that property in order to fall within the resource limit. When an applicant or spouse does not personally own the property, he or she has no legal right to sell it in the first place, and so the harm sought to be mitigated by the exclusion is not present.

Generally speaking, if an applicant or spouse does not own the property the value of the property would not be considered a resource, and so there would be no need for the exclusion. However, the federal Medicaid statute, 42 USC 1396p(d), requires that the assets of a trust established with the applicant or spouse's resources for the applicant's benefit must be counted as a resource for Medicaid purposes notwithstanding the fact that the applicant has no legal title to the property. Again, in that circumstance there is no danger that the beneficiary will sell the trust property to become eligible for Medicaid because the applicant would have no legal right to do so, and the trust will remain to fulfill its purpose of providing for the beneficiary, as Congress intended when it enacted the trust provisions of the Medicaid statute.

Moreover, it must be emphasized that Medicaid is a program to provide federal financial assistance to states that reimburse medical costs incurred by the poor who cannot afford to pay their own medical costs. Arkansas HHS v. Ahlborn, 126 S.Ct. 1752, 1758 (2006); Blum v. Yaretsky, 457 U.S. 991, 993-994 (1982). Medicaid funds are limited, and when the number of people who qualify for those funds exceeds the amount of the funds, the department must reduce the level of benefits. Allowing limited Medicaid resources to be used for individuals who have the financial and legal means to shelter ownership of their resources in legal entities such as corporations and LLCs could defeat the purpose of Medicaid and reduce benefits to people without such resources or so poor as never to be able to consider using LLCs or corporations. The standard requiring personal ownership of property before allowing a resource exclusion for that property is a blunt but necessary standard for the department to determine who is truly the poorest of the poor and hence entitled to extremely limited Medicaid funds.

Therefore, the department is adopting Rules I, II, III, and IV and amending ARM 37.82.101 to incorporate the revised sections of the Medicaid manuals as proposed.

5. The rule changes are effective July 1, 2008.

/s/ Barbara Hoffmann
Rule Reviewer

/s/ Joan Miles
Director, Public Health and
Human Services

Certified to the Secretary of State June 16, 2008.